that is the conditions to be complied with in the use of the permit while in the present case it was the *existence* of licence for a particular purpose which was at issue. In the present case there was sufficient *prima facie* evidence adduced by the prosecution that the respondent was not in possession of the right licence and the burden of proving the existence of the licence for a particular purpose was on the respondent.

Secondly, the learned Magistrate has overlooked the provisions of paragraph (7) of Regulation 19 of the Motor Vehicles (Registration and Licensing) Regulation, 1954, a provision which is not contained in the regulations under which the accused in the cases of *Public Prosecutor v. Sundram*[1] and *Ong Kim Piew*[2] were charged.

In view of the above, the prosecution had fully discharged the burden placed upon it and on this point the learned Magistrate was wrong in holding that there was no case to answer. On this ground the appeal must succeed.

The learned Magistrate, however, also pointed out that the charge against the respondent is that she "caused" the use of the motor vehicle for a purpose other than the purpose for which the licence was granted and found that there was no evidence that the respondent did "cause" the vehicle to be so used. I agree with that finding. If the learned Magistrate had not come to the wrong conclusion on the question of evidence he might have considered amending the charge to one of "permitting" under the same provision of law as the original charge. In view of the authority in *McLeod (or Houston) v. Buchanan*[5] I think there is sufficient evidence to support a charge of "permitting."

The learned Deputy Public Prosecutor, however, informed me that the object of the appeal was to have a ruling on the burden on the prosecution in such cases, he was not pressing for further proceedings.

I will not therefore interfere with the order made by the learned Magistrate.

No order.

CHAN CHUN LING & ANOR. v. PUBLIC PROSECUTOR

[C. A. (Mathew C.J., Wilson and Good JJ.) December 12, 1955]

[K. L. — F.M. Criminal Appeal No. 51 of 1955]

Penal Code ss. 34 & 302 — Murder — Common intention.

This was an appeal against the conviction of the appellants on the charge of murder. One of the grounds of appeal was that the prosecution had failed to establish beyond reasonable doubt a common intention between the 1st and 2nd appellants to kill. It was submitted that the evidence tended to show that the pre-arranged plan was to rob the deceased and not to kill him.

Held: on the facts there was an inevitable inference that there was a pre-arranged plan to effect the robbery by killing the deceased and therefore the appellants were rightly found guilty of murder.

Case referred to:—

(1) *Mahbub Shah v. King-Emperor* 72 I.A. 148.

COURT OF APPEAL.

R. Ramani and *Ng Ek Teong* for the 1st appellant.

R. P. S. Rajasooria and *Eugene Lye* for the 2nd appellant.

E. Brown (Federal Counsel) for the respondent.

Mathew C.J. (delivering the judgment of the Court) — The two appellants in this case were convicted of the murder of one Yap Kon Shin who, on the day of his death, was a cashier in the employ of Wearne Brothers Ltd., Kuala Lumpur, and was on his way in the first appellant's car to pay money and cheques into the Bank. The second appellant was a passenger seated in the back seat of the car.

The first appellant stated in evidence that a plan had been made by him and the second appellant for the second appellant to hold-up both the deceased and himself and then to rob the deceased. The evidence can leave no doubt that in fact the deceased was murderously assaulted by the second appellant, and that the appellants together disposed of the body in a drain on the Sungei Besi Road and hid any articles of clothing on which there were blood-stains. The cash and cheques were taken by the first appellant and a small sum of money was given by him to the second appellant.

The only point of substance which has been argued on behalf of the second appellant is that at the end of the case for the prosecution the learned trial judge should not have called on the second appellant to enter upon his defence. The prosecution evidence against the second appellant may be summarised as follows:—

1. P.W. 16 stated that the first appellant in the presence of the second appellant told him that he wanted to hire a car to carry a corpse.
2. When arrested, the first appellant was in possession of the second appellant's identity card.
3. The second appellant took the Investigating Officer P.W. 19 to a rubbish dump off the Sungei Besi Road, where a handkerchief of the first appellant (Ex: P 32) and a cheque (Ex: P 33) which had been in the possession of the cashier on 10th February 1955 were found.
4. In the Lake Gardens, P.W. 19 found a pair of trousers which had been given to the second appellant by P.W. 21; there were human blood-stains on these trousers.

5. On 10th February 1955 the second appellant, who was then in his under-pants (and no trousers) bought a pair of trousers from P.W. 32.
6. P.W. 38 said that on the night of the 11th February 1955 the second appellant took to her a parcel of clothes to be delivered to the first appellant. The second appellant told her that he had accidentally killed a man.
7. On the night of 11th February 1955 the second appellant was found in a car (BC. 3044) which the first appellant had hired from P.W. 18 on 10th February.

In our view, all this evidence read with the whole prosecution case required the learned trial judge to call upon the second appellant to enter upon his defence. The story of the second appellant that the deceased had seized him by the testicles and that in his agony he hit the deceased cashier was in our judgment properly rejected by the learned trial judge and the assessors. There can be no doubt that the second appellant murdered the deceased and that he was properly convicted.

As regards the first appellant, Mr. Ramani has argued that the second appellant was wrongly convicted, on the ground that the prosecution had failed to establish beyond reasonable doubt a common intention between the first and second appellants to kill. He submitted that apart from the evidence of the first appellant himself all the other evidence tended to support the second appellant's story that the pre-arranged plan was to rob and not to kill. He further contended that the learned trial judge misdirected himself and the assessors by applying the English doctrine of common design and not the doctrine of common intention as laid in section 34 of the Penal Code which reads :—

"When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone."

The effect of this section has been laid down in *Mahbub Shah v. King-Emperor*[1], as follows (at p. 153):—

"To invoke the aid of s. 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan; and to convict the accused of an offence applying the section, it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case."

It has been argued that the pre-arranged plan was to frighten and rob, and that the killing of the deceased was not pre-arranged. It has also been suggested that the absence of any weapon such as a gun, the fact that the hammer which was used to kill was always in the car, and that there were no preparations to dispose of the body are all strong indications that the killing was not pre-arranged.

The story of the first appellant is that a hold-up (both of himself and the deceased) was to be staged by the second appellant, who would then make off with the money and cheques which the deceased was carrying. Thereby all suspicion would be removed from the first appellant. It is a little difficult to understand how the plan could have been carried out if there was no weapon with which to threaten the cashier. If the second appellant were to threaten with no weapon at all, how could the cashier be induced to hand over the cash, and how could the first appellant convince the cashier that he was not a party to the plot? The fact that there was no weapon for the purpose of intimidating the cashier shows that they must have intended to use actual violence. As we have already said, we consider that the story of the deceased squeezing the second appellant's testicles is not credible, and that the learned trial judge and the assessors were entitled to reject it. Once this part of the appellants' story was rejected, it followed that a sudden and unsuspected attack on the deceased cashier was made by the second appellant.

Had the first appellant in fact arranged with the second appellant that no physical violence should be done to the cashier, his conduct in not stopping the car or attempting to go to the aid of the cashier when a murderous rain of blows fell on him is not consistent with that arrangement. On the other hand, he drove on for a number of miles and, according to the first appellant himself, then ordered the second appellant to pull the cashier out of the car and put him in the drain. His whole course of conduct from the moment that he arrived at the round-about points to nothing other than a pre-arranged plan to effect the robbery by killing the cashier. It is impossible to account for the very large number of blows inflicted on the face and head of the deceased, unless there was a determination to kill and to make certain of killing. His account of what happened when the second appellant attacked the cashier is as follows :—

"While I was so driving, the cashier turned and looked at 2nd accused. I do not know what he saw. They struggled. I continued driving. I heard 2nd accused shouting "let go, let go". Then I saw the cashier was bleeding from the head; I don't know why he bled."

This account could not be believed as, how could the injuries as described by the doctor have been inflicted in a Morris Minor motor car without the first appellant knowing exactly what was happening? His failure to assist the cashier in any way and his failure to stop in a crowded thoroughfare, where help was available, indicate strongly that the attack on the cashier had

his full approval, and from this a pre-arranged plan is an irresistible inference.

The first appellant has placed the entire blame on the second appellant and has attempted to show that it was the second appellant who was the master-planner of this horrible crime. In our view, the part played by the first appellant from the time of his persuading the cashier to take a lift in his car to the moment when he took possession of the whole proceeds of the robbery (except for the few dollars he gave the second appellant) shows clearly that it was he and not the second appellant who was the directing mind.

Certain passages in the summing-up have been criticised, but looking at the summing-up as a whole, we consider that correct directions on the evidence and the law were given, and the assessors were left in no doubt as the meaning of the questions of fact on which their opinions were required. In our view, no other verdict on the evidence was possible. and the appeals are accordingly dismissed.

Appeals dismissed.

Solicitors for the appellants: *Braddell & Ramani; R. P. S. Rajasooria & Eugene Lye.*

SINNASAMY v. PUBLIC PROSECUTOR

[C. A. (Mathew C.J., Wilson and Good JJ.) December 12, 1955]

[K. L. — F.M. Criminal Appeal No. 69 of 1955]

Penal Code ss. 84 & 302 — Murder — Defence of automatism — Irresistible impulse — Failure to call witness who might have been produced — Evidence Ordinance, 1950, s. 114(g).

This was an appeal against the conviction of the appellant for the murder of his daughter aged 21 months. The medical evidence called at the trial showed that the appellant was an epileptic. The Medical Officer called at the trial further stated that automatism is associated with some cases of epilepsy and that a person acting under a state of automatism would not be conscious at the time. The appellant in his evidence showed that he had a clear recollection of the events. The defence was that the appellant did the act when in a state of automatism.

Held: (1) the onus was on the appellant to bring himself within the exception set in s. 84 of the Penal Code and on the facts of the case the learned trial Judge was right in holding that he had failed to do so; (2) irresistible impulse *per se* is no defence and can only be a defence when it is proved to have been a result of insanity in law, the onus of proving this lay on the appellant and he did not succeed in discharging it.

Semble: the failure to produce a witness, a six year child in this case, could not have affected the decision since on the evidence the conclusion that it was the appellant who killed the child was inescapable.

COURT OF APPEAL.

R. G. Ritchie for the appellant.

J. G. Adams (Federal Counsel) for the respondent.

Good J. (delivering the judgment of the Court): — This is an appeal against the conviction of the appellant for the murder of his daughter aged twenty-one months. The facts are not in dispute, nor is there any material discrepancy between the evidence for the prosecution and the evidence of the accused. There is no discoverable motive for the killing of the child. The appellant, though he remembered in considerable detail the events and circumstances immediately preceding and immediately following the act, maintained that he had no recollection of the act itself or why he did it.

There is a medical history based on the evidence of the mother of the child, with whom the appellant had been living for ten years and by whom he had had three children. Her evidence was unrefuted, and can be taken as having been accepted. In the light of that evidence, and of a report by a doctor who had previously had the appellant under observation, and of a brief examination during the trial, a specialist in mental disorders testified that the appellant is an epileptic.

The defence was that the appellant did the act when in a state of automatism, which is a temporary loss of consciousness associated with some types of epilepsy. The onus was on the appellant to set up this defence, and the question is, whether he has succeeded in bringing himself within the exception set out in section 84 of the Penal Code.

Mr. Ritchie, who argued this appeal most ably on behalf of the appellant, based his arguments on two main grounds (grounds 1 and 2 of the Further grounds of Appeal) which may be summarised thus :—

That the appellant, if he did the act, may have done it in a state of automatism, which would bring him within section 84 of the Penal Code; and that the prosecution failed to prove the necessary intention or knowledge to support a conviction for murder.

In the course of his argument he criticised the judgment of the learned trial judge in two respects :—

Where in disagreeing with the assessors, he says that their answers to the questions put to them were completely contrary to the medical evidence; and where he refers to the learned Deputy Public Prosecutor's suggestion that the appellant killed his child on an irresistible impulse possibly caused by the children annoying him for a moment.

As regards the first main ground of appeal, and the objection to the passage in the judgment which is connected with it, we are of the opinion that the learned trial judge was right in his conclusion. The doctor, while accepting that the appellant was an epileptic and that automatism is associated with some cases of